IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 5, 2007 Session

PEGGY GASTON v. TENNESSEE FARMERS MUTUAL INSURANCE COMPANY

Appeal from the Circuit Court for McMinn County
No. 21673 Jerri S. Bryant, Chancellor

No. E2006-01103-COA-R3-CV - FILED JUNE 21, 2007

This case involves issues pertaining to under-insured motorist coverage, the Tennessee Consumer Protection Act ("the TCPA"), the insurance bad faith statute, and the subject of prejudgment interest. In an earlier appeal, the Supreme Court reversed the trial court's judgment directing a verdict for the insurance company at the conclusion of the plaintiff's proof. In doing so, the High Court held that there was evidence from which a jury could reasonably conclude that the insurance company had waived the subrogation provisions of the plaintiff's policy. The Supreme Court also held that issues relating to the TCPA and the bad faith statute were for the trier of fact. On remand, the parties waived a jury and the case proceeded to trial before the court. At the conclusion of the trial, the court (1) found that the plaintiff's insurance company had waived the subrogation provisions of the policy precluding it from asserting non-compliance with those provisions as a defense to the plaintiff's claim for under-insured motorist coverage; (2) awarded the plaintiff $25,000 based upon (a) the under-insured motorist coverage of the policy and (b) the insurance company's violation of the TCPA; (3) granted the plaintiff a judgment for attorney's fees; (4) found that the insurance company was not guilty of bad faith; (5) denied the plaintiff's request for treble damages; and (6) refused to award prejudgment interest. The insurance company appeals. Both parties raise issues. We reverse the trial court's refusal to award prejudgment interest. In all other respects, the judgment of the trial court is affirmed. Furthermore, we hold that the plaintiff is entitled to her reasonable attorney's fees and costs associated with this appeal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Reversed in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Larry B. Nolen, Athens, Tennessee, for the appellee, Peggy Gaston.

H. Chris Trew, Athens, Tennessee, for the appellant, Tennessee Farmers Mutual Insurance Company.

OPINION

I.

The core facts in this case are essentially undisputed. With a few relatively-minor exceptions, the facts now before us are the same as those before the Supreme Court at the time of the earlier appeal. For this reason, we will quote extensively from the Supreme Court's recitation of the facts in the earlier opinion ("***Gaston I***"):

> On June 10, 1996, the plaintiff, Peggy Gaston, then age 59, was driving her 1996 Honda Civic automobile in a southerly direction on Highway 411 in Englewood, Tennessee, when she was struck head-on by a 1987 Ford Mustang driven by sixteen-year-old Stephanie Wise and owned by her father, Tim Wise. The undisputed evidence at trial was that Stephanie Wise was driving on the wrong side of the road at the time she collided with Gaston's vehicle. As a result of the accident, Peggy Gaston suffered serious bodily injuries and incurred medical bills exceeding $30,000. Her automobile, valued at $15,401.25, was a total loss.
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> Gaston and her husband, Dane Gaston, were insured by the defendant, Tennessee Farmers Mutual Insurance Company ("Tennessee Farmers"). Their policy had the following limits: $50,000 bodily injury liability per person; $50,000 property damage per accident; $50,000 uninsured/under-insured for property damage; $5,000 medical payments; and $50,000 uninsured/under-insured for bodily injury each person, up to $100,000 per accident. The policy stated:
>
> *WHAT IS NOT COVERED*
>
> > We do not provide uninsured coverage for property damage or bodily injury sustained by any person or entity:
> >
> > * * *
> >
> > If that person or entity or the legal representative of that person settles the bodily injury or property damage claim without our written consent.
>
> Tim Wise, the owner of the 1987 Ford Mustang that struck the Gastons' vehicle, had an automobile liability policy with CNL

Insurance America Company ("CNL"), which provided coverage of $25,000 per person for bodily injury and $10,000 for property damage.

The day after the accident, June 11, 1996, Peggy Gaston's daughter, Dana Gaston Watson, reported the accident to David Brown, Tennessee Farmers' senior claims adjuster. Gaston's husband, Dane Gaston, also discussed the insurance coverage with Brown and the fact that there was no "stacking" of the CNL limits with Tennessee Farmers so that only $25,000 of under-insured coverage was available, plus $5,000 medical payments coverage. On June 25, 1996, Tennessee Farmers paid $15,201.25 to the Gastons for the total loss of their vehicle.

On August 19, 1996, the Gastons sent a demand letter to Betty Kinnas, a claims adjuster at CNL. The letter enclosed medical bills incurred by Peggy Gaston and requested payment of the $25,000 coverage as soon as possible. A copy of the letter was sent to David Brown, the senior claims adjuster at Tennessee Farmers with whom they had been discussing the claim.

On September 1, 1996, Tennessee Farmers received $10,000 from CNL for the subrogation payment it had made to Peggy Gaston for the loss of her vehicle.

On September 30, 1996, Peggy Gaston and CNL reached an agreement under which CNL paid its liability policy limits of $25,000 by payment of $13,000 directly to the University of Tennessee Medical Center and paying the balance of Tim Wise's liability coverage, $12,000, directly to Peggy Gaston. As part of the settlement, the Gastons executed a release with CNL and Tim Wise for Peggy Gaston's bodily injuries.

On November 7, 1996, the Gastons met with David Brown to discuss payment by Tennessee Farmers of the $25,000 under-insured motorist coverage available under their policy. As a result of the discussion, Brown learned that Peggy Gaston had settled her claim made on August 19, 1996, and had signed a release with CNL and Tim Wise. Brown then told the Gastons that Tennessee Farmers would not pay the under-insured motorist coverage afforded under the policy because the Gastons had breached the policy terms by settling with CNL without Tennessee Farmers' written permission.

> Peggy Gaston then filed suit alleging that Tennessee Farmers had breached the insurance contract by failing to pay her claim, had violated the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101 *et seq.* (2001 & Supp. 2003) ("TCPA"), and had acted in bad faith, *see* Tenn. Code Ann. § 56-7-105 (2000).
>
> At a jury trial, Brown testified[1] that he had received a copy of the August 19, 1996 demand letter to CNL, but that he did not contact the Gastons because he believed it would be more advisable "to wait until [he] heard back from Mr. or Mrs. Gaston." Brown also admitted that he knew the University of Tennessee Medical Center had a $13,000 lien against the Gastons for the medical services that had been rendered, that Peggy Gaston had suffered serious injuries from the accident in which liability was uncontested, that Peggy Gaston's medical bills were at least $25,000, that the Gastons would likely file a claim for the under-insured motorist coverage, and that Tennessee Farmers had exposure for the coverage. Neither Brown nor anyone else at Tennessee Farmers, however, contacted the Gastons. Instead, Brown testified that his duty as the Gastons' insurance adjuster was to "answer [insured's] questions when asked" and not "to explain every possibility of a policy or everything that may or may not go right or wrong with a case."

Gaston v. Tennessee Farmers Mut. Ins. Co., 120 S.W.3d 815, 817-18 (Tenn. 2003) (footnotes omitted). In remanding the case to the trial court, the Supreme Court stated the issues to be resolved by the trier of fact:

> After reviewing the record and applicable authority, we agree with the Court of Appeals that there was evidence from which a reasonable jury could find that the insurance company waived the subrogation provisions. We also conclude . . . that the trial court improperly directed verdicts on the insured's claims under the Tennessee Consumer Protection Act and the bad faith statute. We therefore affirm the Court of Appeals' judgment and remand to the trial court for a new trial. . . .

Id. at 823.

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[1] At the first trial, Mr. Brown's testimony was presented by the plaintiff as a part of her proof in chief before the jury. It was received into evidence by way of his deposition. At the second trial, the plaintiff again offered Mr. Brown's testimony through his deposition. When the plaintiff rested, Tennessee Farmers called Mr. Brown as a witness in person. While testifying to a few facts not in the Supreme Court's opinion, he adhered to his testimony as recited in our presentation of the facts in this opinion.

Following remand from the High Court, the trial court conducted a bench trial. At the conclusion of the trial, the court rendered its opinion from the bench. As pertinent to this appeal, the court said the following:[2]

> . . . June 25, '96 plaintiff and her husband executed a release and subrogation receipt [in connection with their property damage claim paid by Tennessee Farmers] that warranted no settlement will be made nor release given by the undersigned Peggy Gaston and Joe Dane Gaston without the written consent of the company, which would be the defendant in this case, and undersigned covenants and agrees to cooperate fully with the company in the prosecution of such claim and to procure and furnish all papers and documents. It goes on with some other language that I am finding is not necessary for the litigation of this case.
>
> The signing of the release, the Court will note that the plaintiff settled her property damages case with the defendant but chose to negotiate her bodily injury case with CNL Insurance; that by signing the release with CNL Insurance for Mr. Wise, that that release did impair the subrogation rights of the defendant. The signing of that release was in violation of the policy of insurance between the plaintiff and the defendant.
>
> And the question at this point becomes did the conduct between the parties or conduct of the defendant waive the ability of the defendant to raise the policy as a defense to collection of uninsured motorist benefits.
>
> * * *
>
> The court in the previous appeal of this case concluded that an insurer with knowledge that an insured was seeking a settlement with another insurance carrier may not fail to act and then seek to enforce the exclusionary clause.
>
> The question then comes down to the failure to act on behalf of the insurer when they did not contact the Gastons prior to settlement of the claim and is it enough of an act on behalf of the insurer to obtain a signed release which reiterates the terms of the policy saying that you can't settle this, you can't settle anything, you agree not to settle anything without our consent.

[2] The trial court's remarks were incorporated by reference into its judgment.

In this case the defendant decided to wait and see what happened and did not inform Ms. Gaston that to settle the case without their consent would void her policy.

Ms. Gaston has sued the defendant based on several theories or causes of action including bad faith. I'll address bad faith first. I find that there was no active involvement from the defendant in this case in doing anything to prejudice the rights of Ms. Gaston, and I find that the defendant did not act in bad faith.

The second theory is whether or not the practices of the defendant were deceptive, and I find under the definition of that term, the defendant did nothing to deceive the plaintiff in this case. The defendant handled the property loss properly, and there were no complaints as to the rental loss in this case. The defendant knew of the fact that the Wise party was at least underinsured, and they knew that they, the defendant, would have exposure to the bodily injury portion of the claim.

In the MFA case versus Flint, the court said that the insurers had a duty to explain the different types of damages and breached that duty when it settled some portion of the claim with the insured and obtained a release without explaining other types of damages to which the insured may have been entitled. I only looked to that case for a definition of what was unfair.

Because I find that the defendant did not commit a deceptive act, the only other basis would be whether the defendant, Tennessee Farmers, acted unfairly toward the plaintiff in this case.

When a company is put on notice that an insured has a claim, and that claim is within the coverage, there arises a duty to deal with the insured in the utmost good faith and fairness, also language coming from the MFA and Flint case. The question in this case is did the defendants [sic] deal with the plaintiff with the utmost good faith and fairness or were they unfair to the plaintiff.

The defendant in this case never cautions the plaintiff that pursuing her third party claim could possibly cut off her right to her uninsured motorist coverage. There appears to be no case law, and I tried to research it further, to decide or to define what duty the defendant owes to the plaintiff other than these words "duty of utmost good

> faith and fairness." The courts use those terms pretty much interchangeably from the cases that I have read.
>
> In dealing with the plaintiff, I think had the defendant even once said, I know you're negotiating with the third party, don't settle your case without letting us approve of it, that we probably would have been in a different situation today. But I don't have any proof as to that except the daughter's testimony that, yeah, hindsight would have been a little different.
>
> In the Rutherford case the court held that the third party settlement had been made with the knowledge and with at least tacit approval of the appellee in the case, which would be the defendant[] Tennessee Farmers.
>
> I think the facts of the Rutherford case are very close to the facts in this case, and I find that Tennessee Farmers did treat Ms. Gaston unfairly in failing to advise her that the actions that she was taking could impair her rights under her insurance policy. And because of that I am awarding her the balance of the claim in this case, the twenty-five thousand.
>
> I will hear posttrial motions on the attorney fees issue, and I will also hear posttrial motions on prejudgment interest. I do not find that this is a case that supports an award for treble damages. I do think there was some hesitancy of giving legal advice to Ms. Gaston by the insurance company. But I think by telling her what the policy had in it was something that would have risen to the level of the duty an insurer has to the insured.

After a post-trial hearing on the issues of prejudgment interest and attorney's fees, the court made additional findings:

> . . . I think it's best to begin first with the prejudgment interest issue. From the cases that I reviewed, I believe Mr. Trew is correct, that by Thurman and the Malone cases, that I am limited by the insurance policy with a cap on the total amount of recovery in this case, and so I'm declining to order prejudgment interest. I think it's an issue of first impression when the Tennessee Consumer Protection Act is implicated in the state of Tennessee, and would, basically, be in conflict with the contract that was created between the plaintiff and the defendant for insurance. So as far as prejudgment interest, I'm denying that one.

> As for the issue of attorney fees, it's hard for me as the trial judge to go back and look at the file and make determinations about issues that were not in front of me the first time. This thing has been tried once, it's gone to the Court of Appeals and the Supreme Court, and then back to me for trial.
>
> When I look at the issue of attorney fees as far as DR2[-]106, this affidavit is not in strict compliance of that rule. I'm having to look at the bill for reasonableness, and, quite frankly, I think at one point, based on some of the deductions that I've taken from the attorney fees, I think there may have been a typographical error. I don't think that -- if there wasn't, I certainly don't think, for instance, on page 3 of 6 of the bill, that it took 30 hours to research and prepare for the Court of Appeals a motion for the case to be submitted on decision of the record. I think that's a typographical error, and that's 27 hours that I took out of that part of the bill. I don't think it took 30 hours for that.
>
> And I made some other deductions, which I think that the amount of time that was taken appeared to be unreasonable. I don't have any other affidavits. I have competing affidavits as to what was reasonable in this case, and I'm making a fact finding that reasonable attorney fees, and I did not deduct any of the actual trial time, so I'm just looking at the total number of hours that Mr. Nolen is requesting at 197 and a half, outside of court 150. I'm deducting from that 10,500, which makes his total request 25,000 – excuse me, $25,625 as what I'm awarding as reasonable attorney fees in this case. . . .

The court further articulated its findings with respect to treble damages and bad faith:

> On the issue of treble damages, I find that when I look at the four parts of the statute, that the consumer was not completely incompetent in this case. The consumer complicated this case by settling her property damage, at which time she signed as part of her release an agreement not to settle the case without the insurance company's permission. That there was no active deception on the part of the insurance company. There was damage to the plaintiff in this case, in that she didn't get paid and has lost the use of this money for several years, but I am noting the fact that the defendant was initially successful in the case.
>
> I'm not finding that the insurance company acted in bad faith. I think that was evident in the original finding. That they did not take an

> affirmative action, but rather an inaction that resulted in the way that this case has progressed. And because of that, I find that the order on treble damages is inappropriate in this case, and I'm declining that issue.

This appeal followed.

II.

We are reviewing a record from a bench trial. In such a case, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us with a presumption of correctness as to the trial court's factual determinations, a presumption we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995). Our review of questions of law is *de novo* with no such presumption of correctness attaching to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996).

III.

Tennessee Farmers raises three issues. These issues present the following questions:

> 1. Is the plaintiff barred from recovering under-insured motorist benefits based upon her breach of the insurance contract with Tennessee Farmers?
>
> 2. Does the evidence preponderate against the trial court's finding that Tennessee Farmers violated the TCPA?
>
> 3. Did the trial court abuse its discretion when it awarded the plaintiff attorney's fees of $25,625?

The plaintiff also raises issues. Her issues pose the following questions:

> 1. Does the evidence preponderate against the trial court's finding that Tennessee Farmers was not guilty of bad faith?
>
> 2. Did the trial court abuse its discretion in failing to award the plaintiff treble damages?
>
> 3. Did the trial court abuse its discretion when it failed to award the plaintiff any prejudgment interest?
>
> 4. Did the trial court abuse its discretion when it awarded the plaintiff only a portion of her attorney's fees?

5. Is the plaintiff entitled to costs and attorney's fees in connection with this appeal?

IV.

A number of the issues in this case pertain to matters that implicate the discretion of the trial court. For example, courts have discretion with respect to an award of attorney's fees under the TCPA, *see* T.C.A. § 47-18-109(e)(1) (2001); treble damages under the TCPA, ***Wilson v. Esch***, 166 S.W.3d 729, 731 (Tenn. Ct. App. 2004); and prejudgment interest, ***Spencer v. A-1 Crane Serv., Inc.***, 880 S.W.2d 938, 944 (Tenn. 1994). An issue pertaining to the imposition of a bad faith penalty also invokes a trial court's discretion, *see* T.C.A. § 47-14-123 (2001); *see also* ***Daugherty v. Stuyvesant Ins. Co.***, 169 Tenn. 300, 86 S.W.2d 1095, 1096 (1935).

Under the abuse of discretion standard of review, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting ***State v. Scott***, 33 S.W.3d 746, 752 (Tenn. 2000) & ***State v. Gilliland***, 22 S.W.3d 266, 273 (Tenn. 2000)). A trial court abuses its discretion when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." ***State v. Shirley***, 6 S.W.3d 243, 247 (Tenn. 1999) (citation omitted). We are prohibited from substituting our judgment for that of the trial court in the absence of an abuse of discretion. ***Myint v. Allstate Ins. Co.***, 970 S.W.2d 920, 927 (Tenn. 1998).

V.

A.

In its first issue, Tennessee Farmers raises the question of whether the plaintiff is barred from recovering under-insured motorist benefits because, the company contends, she breached her policy of casualty insurance with the company. The crux of Tennessee Farmers' position is that the plaintiff is barred from recovery because she breached her contract when she settled her bodily injury tort claim against the Wises and a release was executed in favor of them and their insurer, CNL, without the written consent of Tennessee Farmers – such consent being required under the terms of the policy. Tennessee Farmers argues that the trial court found this breach but erroneously concluded that it did not bar the plaintiff's recovery in this case. Tennessee Farmers strenuously argues that it did not waive, expressly or by implication, the written consent/subrogation provisions of the policy. It points to the fact that there is clear evidence in the record that it pursued its subrogation rights with respect to the plaintiff's property damage and that the plaintiff was well aware of this before she settled her bodily injury claim with the Wises and their insurer.

In further support of its argument on this issue, Tennessee Farmers points to its settlement with the plaintiff under the collision feature of the policy. Specifically, Tennessee Farmers relies upon the fact that, when it settled the Gastons' claim under the collision coverage – a settlement that

occurred on June 25, 1996 – the Gastons executed a release in favor of Tennessee Farmers that contains the following language:

> . . . the undersigned hereby subrogates said Company, to all of the rights, claims and interests which the undersigned may have against any party, person, persons, property or corporation liable for the loss mentioned above, and authorizes the said Company to sue, compromise or settle. . . .
>
> Warranted no settlement has been made by the undersigned with any party, person, persons, property or corporation against whom a claim may lie, and no release has been given to anyone responsible for the loss, and that no such settlement will be made nor release given by the undersigned without the written consent of the said Company. . . .[3]

As can be seen, this release was executed some three months before the claim against the Wises and CNL was settled on September 30, 1996.

In addition, Tennessee Farmers notes that on or about September 18-19 of 1996, it returned the plaintiff's $200 deductible after it had collected from CNL a portion of the amount Tennessee Farmers had paid to the Gastons for their property loss. According to Tennessee Farmers, the return of the $200 to the plaintiff should have put her on notice that the company was not waiving, but rather was actively pursuing, its subrogation rights and that this "message" was communicated to the plaintiff after Tennessee Farmers had received the plaintiff's demand letter to CNL and before the plaintiff settled with the Wises and CNL. Tennessee Farmers urges us to hold that this "response" – the payment of the $200 – should be construed as a communication to the plaintiff that the plaintiff should do nothing to impair Tennessee Farmers' subrogation rights. The plaintiff testified, that when she received the payment, she knew it was a return of her deductible but that she did not place any particular significance on the fact that Tennessee Farmers "had [] gotten its money back from somebody."

The critical issue before us – under the holding of the Supreme Court in ***Gaston I*** and its remand language – is whether, in the words of the High Court, "the insurance company waived the subrogation provisions." ***Gaston I***, 120 S.W.3d at 823. In ***Gaston I***, the Supreme Court discussed the law pertaining to the concept of waiver:

> We begin our review by examining the basic principles of waiver, including "the long-standing rule in Tennessee than *any* contractual provision of a policy of insurance, whether part of an insuring,

[3] While this release was not mentioned by the Supreme Court in ***Gaston I***, the quoted language was read into the record at the first trial through the plaintiff's testimony.

exclusionary, or forfeiture clause, may be waived by the acts, representations, or knowledge of the insurer's agent." Indeed, this Court has specifically stated that

> [a] waiver is a voluntary relinquishment by a party of a known right.... "[I]t may be proved by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct...."

The burden of proof to establish waiver rests with the insured, and is a question of fact for the jury.

These familiar waiver principles were applied by this Court in *Rutherford* to facts very similar to the present case. The defendant, Tennessee Farmers, knew that its insured in *Rutherford* was negotiating a settlement with an under-insured motorist's insurance company, yet it did not intervene or warn the insured, who was represented by counsel, that her settlement would result in losing under-insured motorist coverage if she did not obtain Tennessee Farmers' written consent to settle the claim. After the insured settled the claim with the other party's insurance company, the defendant denied coverage of the claim on the basis of a provision that prohibited the insured from settling without the written permission of the insurer. We concluded that an insurer with knowledge that an insured is seeking a settlement with another insurance carrier may not fail to act and then seek to enforce exclusionary terms of a policy. We also emphasized that an insurer could not decline to pay a claim based upon a policy exclusion in a case where the insurer's reliance on that policy provision appeared to be an afterthought.

Id. at 819-20 (citations omitted) (emphasis in original). The Supreme Court went on to find that "these [waiver] principles are fully applicable in this case." ***Id.*** at 820. In its analysis, the Court highlighted the following facts:

> David Brown acknowledged that he received the letter and that he understood the consequences of Peggy Gaston settling the claim directly with CNL. After having earlier discussed the under-insured coverage with the Gastons, and knowing that Peggy Gaston had substantial medical bills and serious injuries for which Tennessee Farmers had exposure on its coverage, Brown simply decided to wait to see what developed rather than inform Mrs. Gaston that she risked losing the coverage she had been paying for if she carried out her

> course of action. Neither Brown nor anyone else at Tennessee Farmers ever contacted the Gastons.

Id. Based upon these facts, the Court then concluded:

> Accordingly, we believe that the evidence was sufficient for a reasonable jury to find that Tennessee Farmers waived its policy provision requiring written consent before its policyholder could settle with a third party.

Id.

In the instant case, the trial court, early in its opinion rendered from the bench, stated that the question before it was whether "the conduct between the parties or conduct of [Tennessee Farmers] waive[d] the ability of [Tennessee Farmers] to raise the policy as a defense to collection of uninsured motorist benefits." In so many words, the trial court – recognizing that the Supreme Court in ***Gaston I*** had found evidence of waiver from the plaintiff's proof – found that the plaintiff was not barred from recovery based upon the written consent/subrogation provisions of the policy.

Tennessee Farmers argues that the trial court found that the plaintiff "breached" its contract with the company. This is not an accurate statement. While it is true that the trial court stated that the release in favor of the Wises and CNL "did impair the subrogation rights of the defendant" and that the signing of the release by the plaintiff "was in violation of the policy," the court never used the word "breach" and obviously never held that the signing of the release barred the plaintiff's recovery. This is a distinction *with* a difference. Everyone agrees that the plaintiff failed to obtain the written consent of Tennessee Farmers before releasing the Wises and CNL; and it is clear that the release forecloses further pursuit by Tennessee Farmers of its subrogation rights against the Wises. However, an insured cannot "breach," in a legal sense, an insurance contract provision that is no longer enforceable; a provision that can no longer be asserted as a defense to the insured's claim because the right to enforce it had been waived by the insurance company's conduct and/or inaction.

It is important to again note that the bench trial added very little new evidence over and above the facts before the Supreme Court in ***Gaston I***. Tennessee Farmers points out and relies upon one piece of evidence that apparently was not before the Supreme Court in the first appeal. On September 25, 1996 – before the plaintiff executed the release in favor of the Wises and CNL on September 30, 1996 – Mr. Brown reported to the home office that he had talked to Tammy Wise, the mother of Stephanie Wise, and that his conversation basically dealt with Tennessee Farmers' subrogation rights. He told Mrs. Wise, in the words of Tennessee Farmers' brief, that "he would be back in touch with the Wise family."

While this evidence certainly supports Tennessee Farmers' contention that it was interested in pursuing its subrogation rights against the Wises, there is no evidence in the record that the

plaintiff knew, at any critical juncture in this case, that this particular conversation with Mrs. Wise had taken place. The linchpin of the Supreme Court's opinion in ***Gaston I*** is that an insurer, with knowledge that its insured is seeking a settlement from a tortfeasor, "may not fail to act and then seek to enforce exclusionary terms of a policy." ***Gaston I***, 120 S.W.3d at 820. The conversation between Mr. Brown and Mrs. Wise has absolutely no bearing on the issue of Tennessee Farmers' failure to act when it became aware that the plaintiff was seeking to settle its bodily injury claim against the Wises.

The relevant facts on the issue of Tennessee Farmers' failure to act in response to its receipt of a copy of the plaintiff's demand-for-settlement letter to CNL are essentially undisputed. While the legal conclusions to be drawn from those facts are sharply disputed, the facts are not. With respect to the relevant facts, on the critical issue in this case, there are no new facts since the Supreme Court's opinion in ***Gaston I***. The High Court found those facts to be evidence of waiver and the trial court tacitly made the same finding. This is reflected in the following comments of the trial court:

> The defendant knew of the fact that the Wise party was at least underinsured, and they knew that they, the defendant, would have exposure to the bodily injury portion of the claim.
>
> * * *
>
> The defendant in this case never cautions the plaintiff that pursuing her third party claim could possibly cut off her right to her uninsured motorist coverage.
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> In dealing with the plaintiff, I think had the defendant even once said, I know you're negotiating with the third party, don't settle your case without letting us approve of it, that we probably would have been in a different situation today.
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> * * *
>
> I think the facts of the Rutherford case are very close to the facts in this case, and I find that Tennessee Farmers did treat Ms. Gaston unfairly in failing to advise her that the actions that she was taking could impair her rights under her insurance policy.

We conclude that the evidence does not preponderate against the determination that there has been a waiver by Tennessee Farmers of the written consent/subrogation provisions of the plaintiff's policy.

B.

The next issue raised by Tennessee Farmers is whether the evidence preponderates against the trial court's finding that Tennessee Farmers violated the TCPA. We hold that it does not so preponderate.

Tennessee Farmers contends that the trial court's holding that it violated the TCPA based upon conduct deemed "unfair" is not supported by the law. Specifically, Tennessee Farmers takes the position that none of the unlawful acts or practices specifically listed in the TCPA, including the general "catch-all" provision, are implicated by the facts in this case. Alternatively, Tennessee Farmers argues that the court erred in holding that its conduct constitutes an unfair act or practice in violation of the TCPA. In support of this argument, Tennessee Farmers relies upon the same evidence discussed above in Section V(A) of this opinion to show that its actions were not unfair to the plaintiff because, according to it, she was provided with ample and fair notice that she should not settle with a third party without Tennessee Farmers' written consent.

The TCPA authorizes:

> [a]ny person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an *unfair or deceptive act or practice* declared to be unlawful by this part, may bring an action individually to recover actual damages.

T.C.A. § 47-18-109(a)(1) (2001) (emphasis added). The provisions of the TCPA are to be "liberally construed" to "protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce. . . ." T.C.A. § 47-18-102(2) (2001).

The TCPA provides that "[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce constitute unlawful acts or practices. . . ." T.C.A. § 47-18-104(a) (Supp. 2006). The TCPA does not state a single-concept definition of the term "unfair" or the term "deceptive." However, "*without limiting the scope of subsection (a)*," subsection (b) enumerates a number of specific "unfair or deceptive acts or practices [which] affect[ ] the conduct of any trade or commerce." T.C.A. § 47-18-104(b)(1)-(43) (Supp. 2006) (emphasis added). Included in this list is a "catch-all" section, *i.e.*, "[e]ngaging in any other act or practice which is *deceptive* to the consumer or to any other person." T.C.A. § 47-18-104(b)(27) (emphasis added).

We agree with Tennessee Farmers that its conduct does not fit neatly into any one of the enumerated acts or practices declared to be unlawful under the TCPA. We also agree that the "catch-all" provision does not apply because it is limited to "deceptive" conduct and the trial court, while finding unfair conduct, expressly stated it did not find that Tennessee Farmers had been guilty of

"deceptive" conduct. However, Tennessee Farmers ignores the clear statutory language that subsection (a) is not limited by the enumeration of unlawful acts or practices contained in subsection (b). *See* ***Roberson v. West Nashville Diesel, Inc.***, No. M2004-01825-COA-R3-CV, 2006 WL 287389, at *6 (Tenn. Ct. App. M.S., filed February 3, 2006). This simply means there can be unfair or deceptive acts or practices other than those specifically set forth in T.C.A. § 47-18-104(b).

The Supreme Court in ***Gaston I*** stated that one could reasonably conclude that Tennessee Farmers had acted in an "unfair" manner in its dealings with the plaintiff:

> Neither Brown nor anyone else at Tennessee Farmers notified or informed Gaston, who was not represented by counsel, that her effort to settle with CNL would prohibit her from collecting under her own policy. In our view, a jury could reasonably conclude that Tennessee Farmers' conduct was unfair or deceptive under the TCPA.

Gaston I, 120 S.W.3d at 822. The facts that were before the High Court in ***Gaston I*** were also before the court at the bench trial. Those facts prompted the trial court to find that "Tennessee Farmers did treat Ms. Gaston unfairly in failing to advise her that the actions that she was taking could impair her rights under her insurance policy." The Supreme Court's holding in ***Gaston I*** is the law of this case. Therefore, it is axiomatic that the trial court's finding of unfairness – something that the Supreme Court had said could be reasonably found – warrants a finding of a violation of the TCPA. The evidence does not preponderate against the trial court finding that Tennessee Farmers was guilty of an unfair act or conduct in violation of the TCPA.

C.

Next, we address the competing issues presented by Tennessee Farmers and the plaintiff with respect to the trial court's award of attorney's fees. In reviewing the award, we conclude that the court did not abuse its discretion.

Simply put, Tennessee Farmers contends that the trial court's award was excessive, while the plaintiff argues that the award was inadequate. Tennessee Farmers contends that a number of items contained in the summary of services provided by the plaintiff's counsel are unreasonable in light of the factors set forth in DR2-106 of the Tennessee Code of Professional Responsibility.[4] The plaintiff counters that Tennessee Farmers' objection to certain entries is based upon its counsel's personal opinion and not on legal authority. In addition, the plaintiff maintains that the trial court reduced the award of attorney's fees with "no reason or justification whatsoever."

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[4] While the Rules of Professional Conduct had replaced the Code of Professional Responsibility when the trial court considered the issue of attorney's fees, *see* Tenn. S. Ct. R. 8 (2003), the court and the parties referred to DR2-106 of the replaced Code, apparently because the majority of the services being evaluated were performed before the adoption of the new Rules. In any event, DR2-106 and RPC 1.5 closely mirror each other. ***See Chaffin v. Ellis***, 211 S.W.3d 264, 290 n.14 (Tenn. Ct. App. 2006).

The courts of this state follow the American Rule. This rule states that "litigants must pay their own attorney's fees unless there is a statute or contractual provision providing otherwise." ***Taylor v. Fezell***, 158 S.W.3d 352, 359 (Tenn. 2005). We are dealing with such a statute in this case. The TCPA authorizes an award of fees. Specifically, T.C.A. § 47-18-109(e)(1) provides that "[u]pon a finding by the court that a provision of this part has been violated, the court *may* award to the person bringing such action reasonable attorney's fees and costs." (Emphasis added). As previously noted, an award under the statute addresses itself to the trial court's discretion.

The factors to be considered in determining whether an attorney's fee is reasonable are currently set forth at Tennessee Supreme Court Rule 8, RPC 1.5(a):

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent;
>
> (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
>
> (10) whether the fee agreement is in writing.

It is clear from the remarks of the trial court at the post-trial hearing that the affidavit and summary of services submitted by the plaintiff's counsel were given careful consideration. The trial court eliminated or reduced certain claimed services and the time spent on them because it determined that the claimed time was excessive or otherwise unreasonable. The evidence does not preponderate against these judgments. We find no abuse of discretion in the trial court's decision

to award the plaintiff $25,625 and no abuse of discretion in the court's failure to award more. Both issues on this subject are found to be without merit.

D.

We next consider whether the evidence preponderates against the trial court's finding that Tennessee Farmers was not guilty of bad faith.

In arguing that she is entitled to the bad faith penalty, the plaintiff cites the Supreme Court's decision in ***Gaston I*** and maintains that the trial court failed to follow the Court's direction that, in the words of the plaintiff's brief, "Tennessee Farmers' conduct in the case constituted bad faith by its failure to pay Gaston's claim." The plaintiff argues that she should receive the maximum 25% recovery authorized by law.

T.C.A. § 56-7-105(a) (2000) provides the following:

> The insurance companies of this state, and foreign insurance companies and other persons or corporations doing an insurance or fidelity bonding business in this state, in all cases when a loss occurs and they refuse to pay the loss within sixty (60) days after a demand has been made by the holder of the policy or fidelity bond on which the loss occurred, shall be liable to pay the holder of the policy or fidelity bond, in addition to the loss and interest thereon, a sum not exceeding twenty-five percent (25%) on the liability for the loss; provided, that it is made to appear to the court or jury trying the case that the refusal to pay the loss was not in good faith, and that such failure to pay inflicted additional expense, loss, or injury including attorney fees upon the holder of the policy or fidelity bond; and provided further, that such additional liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss, and injury including attorney fees thus entailed.

With regard to the plaintiff's argument on this issue, we note that the Supreme Court actually held "that a reasonable jury *could* conclude that Tennessee Farmers' conduct in this case constituted bad faith in connection with its refusal to pay Gaston's claim." ***Gaston I***, 120 S.W.3d at 822 (emphasis added). The Supreme Court did not say that the trier of fact *must* find bad faith in this case.

Before a plaintiff may recover a penalty pursuant to this provision, "(1) the policy of insurance must, by its terms, have become due and payable, (2) a formal demand for payment must have been made, (3) the insured must have waited 60 days after making his demand before filing suit (unless there was a refusal to pay prior to the expiration of the 60 days), and (4) the refusal to pay must not have been in good faith." ***Palmer v. Nationwide Mut. Fire Ins. Co.***, 723 S.W.2d 124, 126 (Tenn. Ct. App. 1986); ***Walker v. Tennessee Farmers Mut. Ins. Co.***, 568 S.W.2d 103, 106 (Tenn. Ct. App. 1977). The plaintiff has the burden of proving the insurer's bad faith. ***Palmer***, 723 S.W.2d

at 126. Whether an insurer acted in good faith is generally a fact question for the trier of fact. ***Mason v. Tennessee Farmers Mut. Ins. Co.***, 640 S.W.2d 561, 567 (Tenn. Ct. App. 1982).

The trial court, in its discretion, did not find that Tennessee Farmers' "refusal to pay the loss was not in good faith." *See* T.C.A. § 56-7-105(a). Our review of the evidence does not persuade us that the evidence preponderates against the trial court's determination. Hence, we find no abuse of discretion.

E.

Next, we consider whether the trial court abused its discretion in failing to award the plaintiff treble damages.

Similar to her argument on the bad faith issue, the plaintiff maintains that she is entitled to the maximum recovery of treble damages under the TCPA because, according to her, the Supreme Court found in ***Gaston I*** that "Tennessee Farmers' conduct was unfair or deceptive." As previously noted, the Supreme Court did not find that the conduct was unfair or deceptive; it merely found that there was evidence from which a trier of fact *could* make such a finding.

The entitlement to treble damages under the TCPA is limited to a "willful or knowing violation," as provided in T.C.A. § 47-18-109(a)(3) (2001):

> If the court finds that the use or employment of the unfair or deceptive act or practice was a willful or knowing violation of this part, the court may award three (3) times the actual damages sustained and may provide such other relief as it considers necessary and proper.

The trial court refused to award treble damages to the plaintiff for the same reasons that it did not find that Tennessee Farmers acted in bad faith. In addition, the court found "no active deception on the part of the insurance company." The court did not find a "willful or knowing violation" of the TCPA as required by T.C.A. § 47-18-109(a)(3). Based upon our review of the record, we find nothing in the record to persuade us that the court abused its discretion in failing to award treble damages.

F.

We now turn to the question of whether the trial court abused its discretion when it failed to award the plaintiff prejudgment interest.

The plaintiff argues the trial court erred in agreeing with Tennessee Farmers' argument that, regardless of what is equitable, an award of prejudgment interest is not appropriate because such an

award would impermissibly cause the judgment against Tennessee Farmers to exceed the uninsured/under-insured coverage limit in the plaintiff's insurance policy.

We start by noting that T.C.A. § 47-14-123, as a general proposition, provides for an award of prejudgment interest based upon principles of equity:

> Prejudgment interest, i.e., interest as an element of, or in the nature of, damages, as permitted by the statutory and common laws of the state as of April 1, 1979, may be awarded by courts or juries in accordance with the principles of equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum. . . .

In ***Myint v. Allstate Ins. Co.***, the Supreme Court elaborated on the legal principles to be considered on the subject of prejudgment interest:

> Several principles guide trial courts in exercising their discretion to award or deny prejudgment interest. Foremost are the principles of equity. Simply stated, the court must decide whether the award of prejudgment interest is fair, given the particular circumstances of the case. In reaching an equitable decision, a court must keep in mind that the purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he or she was legally entitled, not to penalize a defendant for wrongdoing.
>
> In addition to the principles of equity, two other criteria have emerged from Tennessee common law. The first criterion provides that prejudgment interest is allowed when the amount of the obligation is certain, or can be ascertained by a proper accounting, and the amount is not disputed on reasonable grounds. The second provides that interest is allowed when the existence of the obligation itself is not disputed on reasonable grounds.

970 S.W.2d 920, 927 (Tenn. 1998) (citations omitted).

In support of its position that a monetary award to the plaintiff is subject to the $25,000 policy limit, Tennessee Farmers cites two recent decisions of this Court. First, in ***Malone v. Maddox***, No. E2002-01403-COA-R3-CV, 2003 WL 465668, at *1 (Tenn. Ct. App. E.S., filed February 25, 2003), this Court held that "the language of the automobile liability insurance policy pertaining to the limit of liability for uninsured/underinsured motorist coverage prohibits any award of pre-judgment interest that would exceed the limit of liability applicable to the policy." Relying upon the reasoning in ***Malone***, this Court held in ***Thurman v. Harkins***, No. W2004-01023-COA-R3-CV, 2005 WL 1215959, at *5-6 (Tenn. Ct. App. W.S., filed May 23, 2005), that "the trial court did not err when it 'capped' the amount of damages, including pre-judgment interest, pursuant to the limit

stated in the policy." Based upon the authority of ***Malone*** and ***Thurman***, the trial court declined to award prejudgment interest because of the "limit[ation] by the insurance policy with a cap on the total amount of recovery."

In the instant case, the trial court awarded damages to the plaintiff based not only upon the insurance contract but also based upon Tennessee Farmers' *unfair conduct in violation of the TCPA*. ***Malone*** and ***Thurman*** are not implicated by the trial court's finding *under the TCPA*. Because of the TCPA violation, we conclude that the trial court erred in denying the plaintiff's request for an award of prejudgment interest based upon ***Malone*** and ***Thurman***. We hold that the plaintiff's claim for prejudgment interest based upon a violation of the TCPA is governed by T.C.A. § 47-14-123. We will now proceed to examine the strength of the plaintiff's cause of action in the underlying litigation and the value of her claim as a threshold issue in determining whether the plaintiff is entitled to prejudgment interest based upon the applicable statute and the ***Myint*** case.

As previously noted, Stephanie Wise, who was 16 at the time, was driving on the wrong side of the road when she collided head-on with the vehicle driven by the plaintiff. This was a clear case of liability based upon the actions of an under-insured driver.

The plaintiff was seriously injured in the collision. She suffered extensive injuries to her leg, requiring the insertion of a steel rod and numerous screws. According to the plaintiff's testimony at the hearing on remand, her medical bills had increased to approximately $50,000. At the time of the accident, the plaintiff was 59 years old and was working as a store manager at Cato's, where she had been employed for 27 years. This job required the plaintiff to stand and walk a great deal of the time. Although she had planned to continue working as long as possible, the plaintiff was unable to do so because of the serious injuries to her leg. The plaintiff is currently receiving Social Security disability benefits. All of these facts demonstrate that the plaintiff's case for compensatory damages was worth significantly more than $50,000. When she settled her bodily injury claim with the Wises, the plaintiff received $25,000, which was the coverage limit applicable to Ms. Wise through the family's insurance policy. Tennessee Farmers carried under-insured motorist coverage for the plaintiff in the amount of $50,000. Given the undisputed facts in this case pertaining to Ms. Wise's liability and the plaintiff's damages, Tennessee Farmers' obligation pursuant to the under-insured coverage was "certain[ly]" $25,000. The plaintiff's entitlement to this amount cannot be "disputed on reasonable grounds." ***Myint***, 970 S.W.2d at 927. "[G]iven the particular circumstances of [this] case," we hold that an "award of prejudgment interest is fair." ***Id***. We further hold that such an award is necessary "to fully compensate [the] plaintiff for the loss of the use of funds to which . . . she [is] legally entitled." ***Id***.

The Gastons met with Mr. Brown on November 7, 1996, at which time he advised them that Tennessee Farmers would not pay the under-insured coverage of $25,000. This was error. At that point in time, Tennessee Farmers should have told the Gastons that it would pay the remaining portion of the under-insured coverage under its policy, *i.e.*, $25,000. We hold that the plaintiff is entitled to prejudgment interest beginning January 7, 1997, which, as can be seen, is 60 days after the Gastons met with Mr. Brown. We believe that it is fair and reasonable to Tennessee Farmers to

delay the start of the imposition of prejudgment interest, recognizing that it would have taken some period of time to do the necessary paperwork, "cut" a check and otherwise conclude this matter with the Gastons. Furthermore, the 60-day period conforms with the statutory 60-day window afforded to an insurer to avoid the imposition of a bad faith penalty.

Because it will be necessary to retroactively apply an interest rate in this case, the setting of that rate presents a problem. Obviously, interest rates have fluctuated in the past ten plus years. Because we, as an appellate court, are not in a position to determine an appropriate rate of interest, this case is remanded to the trial court for this purpose. If the parties cannot agree on a rate of interest to apply to the entire period involved or otherwise settle this issue, the trial court should schedule a hearing to address the subject of the appropriate rate or rates of interest. If such a hearing is necessary, the trial court is directed to determine, beginning as of January 7, 1997, the rate of interest that was available, for each of the relevant time periods, on an FDIC-insured six-month certificate of deposit in the state of Tennessee. We recognize that these rates will have varied from institution to institution. For each of the relevant six-month periods, the court is directed to award the plaintiff the highest rate of interest then available in this state based upon the evidence presented at the hearing on remand. In other words, the initial period will be from January 7, 1997, to July 6, 1997. The identification of the appropriate rates of interest will extend to the date of the hearing on remand. Hence, the court will have to determine the appropriate rate of interest for some 20 plus separate six-month segments. The interest to be calculated is simple interest. The prejudgment interest statute does not authorize compound interest. ***Otis v. Cambridge Mut. Fire Ins. Co.***, 850 S.W.2d 439, 446-47 (Tenn. 1992).

G.

The final question before us is whether the plaintiff is entitled to costs and attorney's fees in connection with this appeal. We find that she is so entitled.

In a recent decision by the Supreme Court, it was established that "a plaintiff may be awarded reasonable attorney's fees incurred during an appeal on a claim brought under the TCPA where one or more of the TCPA's provisions has been violated." ***Killingsworth v. Ted Russell Ford, Inc.***, 205 S.W.3d 406, 410 (Tenn. 2006). As explained by the High Court, the rationale behind this holding is quite simple:

> If an appeal ensues, the wronged plaintiff's monetary judgment is at risk of being consumed by the resulting appellate attorney's fees unless they are also subject to being awarded. A plaintiff successful at trial is therefore at risk of being "de-remedied" if unable to collect his or her reasonable appellate legal fees. Given the broad remedial goals our legislature determined to pursue with the TCPA, we do not think the General Assembly intended that result. As this Court has previously recognized, a potential award of attorney's fees under the TCPA is intended to make the prosecution of such claims

> economically viable to a plaintiff. The same concern with economic viability applies equally to appellate attorney's fees.

Id. (citation omitted). The Supreme Court further held that "a plaintiff seeking to recover reasonable attorney's fees generated during an appeal of a case brought under the TCPA must set forth his or her intention to do so in his or her appellate pleadings." ***Id.*** at 411. In this case, the plaintiff properly stated her request for reasonable attorney's fees and costs on appeal as an issue in her brief. In light of the

guidelines stated in ***Killingsworth***, we find such an award to be appropriate under the circumstances of this case and remand to the trial court for a determination of the plaintiff's reasonable fees and expenses on appeal.

VI.

The judgment of the trial court is affirmed in part and reversed in part. This case is remanded to the trial court for a hearing on prejudgment interest and the plaintiff's reasonable attorney's fees and expenses associated with this appeal. Costs on appeal are taxed to Tennessee Farmers Mutual Insurance Company.

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CHARLES D. SUSANO, JR., JUDGE